NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. KARL JOSEPH SCHMIEDING Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 981 MDA 2015

Appeal from the PCRA Order May 11, 2015
In the Court of Common Pleas of Huntingdon County
Criminal Division at No(s): CP-31-CR-0000074-2006

COMMONWEALTH OF PENNSYLVANIA Appellee v. KARL JOSEPH SCHMIEDING Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1002 MDA 2015

Appeal from the PCRA Order May 11, 2015
In the Court of Common Pleas of Huntingdon County
Criminal Division at No(s): CP-31-CR-0000465-2005

BEFORE: BOWES, J., PANELLA, J., and PLATT, J.*

MEMORANDUM BY PANELLA, J. **FILED FEBRUARY 02, 2016**

In these consolidated appeals, Appellant, Karl Joseph Schmieding, appeals from the orders entered May 11, 2015, in the Court of Common Pleas of Huntingdon County, which denied his PCRA[1] petition. We affirm.

---

* Retired Senior Judge assigned to the Superior Court.

On September 8, 2006, Appellant pled guilty to various sexual offenses against minors. At docket number CP-31-CR-0000465-2005, Appellant entered a guilty plea to Photographing a Child Involved in Prohibited Sexual Acts, Possession of Child Pornography, Contact with a Minor for the Purpose of Engaging in Sexual Abuse, Unlawful Use of a Computer, Unlawful Contact with a Minor, and four counts of Indecent Assault.[2] At docket number CP-31-CR-0000074-2006, Appellant entered a plea to 13 counts of Possession of Child Pornography and one count of Unlawful Use of a Computer.[3] After reviewing a pre-sentence investigation report ("PSI"), the trial court sentenced appellant to an aggregate term of incarceration of 89½ to 215 months.[4] Appellant did not pursue a direct appeal.

On September 17, 2006, Appellant filed a counseled PCRA petition. An amended PCRA petition followed on September 28, 2012.[5] Although a hearing was conducted on January 9, 2014, Appellant's counsel was

(Footnote Continued)

[1] Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

[2] 18 Pa.C.S.A. §§ 6312(b); 6312(d); 6318(a)(5); 7611(a)(1); 6318(a)(1); and 3126, respectively.

[3] 18 Pa.C.S.A. §§ 6312(d) and 7611(a)(1), respectively.

[4] Appellant's sentences were amended on September 15, 2006.

[5] The attorney who filed Appellant's original PCRA petition was permitted to withdraw his representation. Appellant's newly retained counsel filed the amended petition.

subsequently disbarred, for reasons not of record, and new counsel was appointed. A new evidentiary hearing was held on October 3, 2014. The PCRA court denied Appellant's petition. This timely appeal followed.

Appellant raises the following issues for our review.

> 1. Whether the PCRA [c]ourt erred in ruling that the [guilty plea] was knowingly, voluntar[ily], and intelligently made where there was evidence that neither his attorney nor the [c]ourt understood the plea/sentencing?
>
> 2. Whether the PCRA [c]ourt erred in finding [Appellant's trial] attorney effective where said attorney failed to call defense witnesses for [Appellant] at the time of sentencing?
>
> 3. Whether [Appellant's] attorney was ineffective for his failure to file an appeal?

Appellant's Brief at 2.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*, ***Edmiston v. Pennsylvania***, 134 S. Ct. 639 (2013). "[Our] scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. ***See*** 42

Pa.C.S.A. § 9543(a)(3). "[T]his Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

It is well settled that

> [t]o plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act.

Commonwealth v. Rykard, 55 A.3d 1177, 1189-1190 (Pa. Super. 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013) (citation omitted). "Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." ***Commonwealth v. Colavita***, 993 A.2d 874, 887 (Pa. 2010) (citation omitted). A failure to satisfy any prong of the test will require rejection of the claim. ***See Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014).

We first address Appellant's claim that trial counsel was ineffective for failing to file a direct appeal. We note that the unjustified failure to file a direct appeal is ineffective assistance of counsel *per se* and that a defendant need not demonstrate his innocence or show that he would have likely succeeded on appeal in order to meet the prejudice prong of the test for ineffectiveness. ***See Commonwealth v. Mikell***, 968 A.2d 779, 781 (Pa. Super. 2009). However, before we will find counsel ineffective for failing to pursue a direct appeal, Appellant bears the burden of proving that he

requested an appeal and that counsel disregarded his request. ***See Commonwealth v. Bath***, 907 A.2d 619, 622 (Pa. Super. 2006). A mere allegation will not suffice to prove that counsel ignored a defendant's request to file an appeal. ***See Commonwealth v. Spencer***, 892 A.2d 840, 842 (Pa. Super. 2006).

Appellant testified at the first PCRA evidentiary hearing that he requested trial counsel to file an appeal on his behalf both in person and in numerous letters.[6] ***See*** N.T., PCRA Hearing, 1/9/14 at 6. Appellant's allegations, however, were contradicted by trial counsel's testimony during the second PCRA evidentiary hearing. Trial counsel testified that he executed with Appellant a document explaining his appeal rights, but that Appellant never requested a direct appeal. ***See*** N.T., PCRA Hearing, 10/3/14 at 13; Explanation of Appellate Rights, 9/8/06. Counsel explained that had Appellant requested a direct appeal he would have filed it, as Appellant had an absolute right to an appeal. ***See id***.

In finding that Appellant had not met his burden of proving that he requested trial counsel to file a direct appeal, the PCRA court implicitly credited trial counsel's testimony. ***See*** Trial Court Opinion, 5/11/15 at 9. Appellant has not presented any further evidence to support his claim on

---

[6] Appellant oddly does not assert in his appellate brief that he requested counsel to file an appeal, but rather maintains that his mother attempted to contact counsel numerous times following sentencing to no avail. ***See*** Appellant's Brief at 21-22.

appeal. Based on counsel's testimony, as credited by the PCRA court, we find that Appellant has failed to adequately support his claim that counsel ignored his request to file an appeal. ***See Commonwealth v. Anderson***, 995 A.2d 1184, 1189 (Pa. Super. 2010) (a PCRA court's credibility determinations are binding on this Court where there is record support for those determinations). Accordingly, as Appellant has failed to meet his burden of proof, his claim that trial counsel was ineffective for failing to file a direct appeal is without merit.

Appellant also claims that he did not knowingly or voluntarily enter his guilty plea. His argument is two-fold. To the extent that Appellant argues that his guilty plea was rendered involuntary by the trial court's alleged failure to conduct an adequate guilty plea colloquy, this claim is waived for his failure to raise it in a post-sentence motion and to pursue it on direct appeal. ***See*** 42 Pa.C.SA.. § 9544(b) ("[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."); ***Commonwealth v. Rachak***, 62 A.3d 389, 391 (Pa. Super. 2012), ***appeal denied***, 67 A.3d 796 (Pa. 2013) ("While [the a]ppellant focuses on the voluntariness of his guilty plea, that issue should have been raised on direct appeal; it was not. Therefore the issue is waived." (footnote omitted)).

We will, however, address Appellant's claim that the ineffective assistance of plea counsel caused him to enter an involuntary or unknowing plea. "A criminal defendant has the right to effective counsel during a plea

process as well as during trial." ***Commonwealth v. Rathfon***, 899 A.2d 365, 369 (Pa. Super. 2006) (quotation omitted). "Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." ***Commonwealth v. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002) (citation omitted). "Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." ***Id***. (citations and internal quotation marks omitted).

In assessing the voluntariness of a guilty plea, we note that "[t]he law does not require that appellant be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [appellant's] decision to plead guilty be knowingly, voluntarily and intelligently made." ***Commonwealth v. Yager***, 685 A.2d 1000, 1004 (Pa. Super. 1996) (*en banc*) (citation and internal quotation marks omitted). "A person who elects to plead guilty is bound by the statements he makes in open court while under oath and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy." ***Commonwealth v. Pollard***, 832 A.2d 517, 523 (Pa. Super. 2003) (citation omitted).

Appellant argues that, at the time he entered his guilty plea, he believed that he would receive a negotiated sentence of three to five years,

to run concurrent to charges pending in Franklin County.[7] ***See*** Appellant's Brief at 9. He maintains that he was misled by counsel regarding the penalty to which he was subject under the plea agreement. ***See id***. at 13. The record does not support Appellant's assertion.

We first note that there was no plea agreement to the charges at docket number 74 of 2006. ***See*** N.T., Sentencing, 9/8/06 at 27. At docket number 465 of 2005, it appears that the agreement was only that Appellant would serve a county sentence, which the trial court noted would not stand if the aggregate of the sentences at both docket numbers exceeded 60 months. ***See id***. at 27-28. Neither Appellant nor his counsel voiced any objection to proceeding with the guilty plea at that time. The trial court then proceeded to sentence Appellant at number 465 of 2005 to 24½ to 59 months' imprisonment – a term *less* than the three to five year sentence Appellant now argues counsel "misled" him to believe he would receive under the agreement – to be served consecutive to the sentence imposed at number 74 of 2006.

Unfortunately, the record contains no document or other writing memorializing the exact terms of the plea agreement. However, it is clear that Appellant cannot seriously argue that he was misled by counsel to

---

[7] In sentencing Appellant, the trial court made no mention of the charges pending at Franklin County. We assume Appellant refers to the trial court's decision to order the sentences imposed at the two docket numbers to be served consecutively.

believe he would receive a sentence greater than the one actually imposed by the trial court. We can only assume that the crux of Appellant's argument is that he was misled by counsel to believe the sentence at number 465 of 2005 would run concurrent, rather than consecutive to the sentence imposed at number 74 of 2006.

At the PCRA hearing, trial counsel testified that he actively discussed the plea negotiations with Appellant under the premise that, although the Commonwealth would agree to the imposition of concurrent sentences, the recommendation was not part of the plea agreement or binding on the trial court. ***See*** N.T., PCRA Hearing, 10/3/14 at 7. As noted, we do not have the benefit of reviewing a written negotiated plea agreement. Nonetheless, based upon the record before us and what we are able to discern from the argument, such as it is, presented by the Appellant, we find that Appellant has failed to establish that he was prejudiced by counsel's actions or that counsel's actions otherwise caused Appellant to enter an unknowing or involuntary plea. Accordingly, this claim fails.

Finally, we likewise find no merit to Appellant's remaining claim that trial counsel was ineffective for failing to call character witnesses at sentencing. Trial counsel will not be deemed ineffective for failing to call a witness to testify unless it is demonstrated that

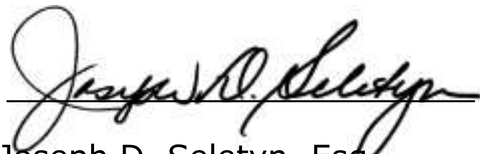
> (1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial.

Commonwealth v. Brown, 18 A.3d 1147, 1160-1161 (Pa. Super. 2011) (citation omitted).

Herein, Appellant does not establish the identity of any character witnesses, their availability at the time of trial, or the substance of the witnesses' testimony. Without this necessary evidence we are unable to conclude that the the absence of the testimony was so prejudicial to petitioner to have denied him a fair trial. Accordingly, this claim does not merit relief.

Orders affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/2/2016